United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES V. TURNER,

Appellant

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v.

UNITED STATES OF AMERICA,

Appellee

No. 21,443

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF ISSUES PRESENTED FOR REVIEW *

1. Where a juror, following verdict, makes allegations of misconduct on behalf of other jurors, and which show bias, are legal requirements met where the Court holds an in-chambers hearing, not under oath, but in the presence of the parties and their attorneys, and each juror is interrogated separately concerning the alleged misconduct, but none is put under oath and there is no confrontation between the accusing juror and the alleged jurors involved?

2. Did the prosecuting attorney exceed the bounds of proper argument on rebuttal, in a case where appellant is being tried for grocery store robbery, to allude to a popular novel about a mass family murder in Kansas, and an infamous bank robber and killer of the 1930's in an attempt to bolster the credibility of his key witness, a convict and an admitted perjurer?

3. Where the Government's key witness is a convict and an admitted robber and perjurer, should the Court have ordered his Grand Jury testimony, all statements, recorded and unrecorded, and conducted a voir dire, outside the presence of the jury to determine if the witness was motivated by considerations other than telling the truth and whether he, was in fact and in law, coerced into testifying?

4. Should a new trial have been ordered where a juror admits that he remained silent during voir dire to questions concerning members of his family having been the victim of a crime, when such was the case and the juror felt that it was not relevant to the case?

*This is the first instance in which this case is before this Court.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,443

CHARLES V. TURNER,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal from a criminal conviction in the District Court on a one Count indictment charging Robbery. The judgment and commitment, wherein appellant, Charles V. Turner, was adjudged guilty and sentenced from three (3) to twelve (12) years was filed on August 28, 1967. A motion under Rule 37 (a) of the Federal Rules of Criminal Procedure (abrogated July 1, 1968) was filed and granted on September 27, 1967, extending the time to file the Notice of Appeal and the Notice of Appeal was filed October 6, 1967.

The first trial of this case resulted in a hung jury and the case was retried in June of 1967. Appellant was one of three defendants below. The other two defendants were Oscar Tyler, Jr., who was convicted along with appellant and one

Derotha Flynn, who was found not guilty of the charge.

The evidence from the standpoint of the Government showed that on December 1, 1965, approximately 7:30 A.M., being a Wednesday, four men entered the Giant Food Store at 6541 Georgia Avenue, N.W., in the District of Columbia and at gun point obtained the sum of about $3,300.00

Mr. Navie Rowley, assistant manager trainee, was in the manager's office from which the money was taken. He could not identify any of the robbers. Another employee, Joseph Bowman, identified Appellant as one of the gunman. (Tr. 78-79). He could not remember whether appellant had on a hat. (Tr. 82), but stated that he had a mask on the bottom part of his face. (Tr. 82). He admitted later that the mask was a handkerchief and was below the nose. (Tr. 95). He stated that he saw appellant again in either February or March of 1966 down stairs in the Courthouse. (Tr. 85). He was not wearing a mask and had a hat on in the Commissioner's Office. (Tr. 88).

Another employee, Henry Fox identified Tyler as one of the robbers. (Tr. 103).

During the cross-examination of the witness, Henry Fox, by counsel for Tyler, Fox stated in response to a question as to where he had seen Tyler after December 1, 1965, that it was in the court-room and he also had seen photographs of the man before that. (Tr. 130). A motion for mistrial was denied. (Tr. 140). The witness again stated that he had seen clear photographs of Tyler. (Tr. 140). Again a motion for mistrial was denied. (Tr. 158).

The next witness for the Government was one Clarence McFarland. McFarland stated that he was in jail serving nine years for bank robbery. (Tr. 164). He stated that he knew the three defendants at the trial. (Tr. 165) and stated that he saw the three at about 8:00 P.M. the night before the robbery at the Club 2011. (Tr. 167), and that they would meet the next day about a robbery. (Tr. 167-168). The four got together about 5:00 A.M. the next morning in a restaurant in the 4400 block of Benning Road. McFarland had a police radio in his car and all four had .38's (guns) (Tr. 168-169).

McFarland testified that the party went to several Safeway and Giant stores between 5:00 and 7:30 A.M. for the purpose of robbery and decided on the Giant store on Georgia Avenue. (Tr. 169-170). All four entered the store, the robbery was consummated and the employees were put in a walk-in box and the four then left the store by the rear. During the course of the robbery, McFarland testified that Flynn stayed by the walk-in box. (Tr. 171). Tyler went to the middle of the store and announced a hold-up and McFarland and appellant went to the manager's office. (Tr. 171). About $3300.00 was taken. (Tr. 174). The money was divided up in the rear of an apartment building on 13th Street, each getting a little over $800.00. (Tr. 177). All discussed alibis. Tyler would get someone to cover for him on his job. Flynn was going back to Philadelphia and McFarland went to his son's school on Alabama Avenue. (Tr. 178).

On cross-examination, McFarland admitted he made his living through robberies. (Tr. 180). He first told the police about this robbery in June of 1966. (Tr. 186). McFarland went on to state that he had implicated several other persons in robberies and had never been indicted in any case in which he gave evidence. (Tr. 205). McFarland also stated that when he testified before the Grand Jury about the case, he did not tell the Grand Jury about his participation in this case. (Tr. 216-218). On further cross-examination by Flynn's counsel, McFarland stated that all four had hats on. (Tr. 255).

McFarland also gave evidence concerning the fact that the prosecutor would assist him in obtaining a barber's license and he also hoped that further sentences he would or might receive would be concurrent with the sentence he was then serving. He further testified that in 1964 he was arrested for carrying a prohibited weapon which was found in the trunk of his car. He felt that one of his friends had informed on him about the gun and this was one motivation for his being an informer.

The Government rested its case with the testimony of McFarland and motions for judgment of acquittal were denied. Appellant did not testify.

During the rebuttal argument of the prosecutor, the following was stated by him, regarding McFarland:

> "Perhaps some of you read Truman Capote's book, In Cold Blood. He probably made a million dollars writing that story. If you read the story you know that that vicious horrendous crime would not have

> been solved but for a accomplice coming forward, someone who heard something, one from the criminal ranks coming up. The crime is solved. If you go back a little bit farther in history, back into the early 30's, with John Dillinger -- there is not one of you who doesn't remember the fact about Dillinger. After he plagued the country for a long time, was a fugitive, the Bureau of Investigation trying to find him, he robbed another bank, he is locked up again, he escapes again, he kills a policeman in the city of Chicago. But Dillinger can't be found. How do you find Dillinger? Only from someone from within the criminal ranks coming forward, the notorious lady in red. She came forward, and you will recall she told the partner of the policeman who had been killed where Dillinger would be on a given night and as he came out of the theater and moved for his gun, he was killed. Had ne not been killed surely other policemen would have been killed and other banks would have been robbed." (Tr. 15-16 of the transcript of proceedings of June 7, 1967.)

A motion for a mistrial was made by counsel for Tyler, which motion was denied by the Trial Judge. Counsel felt that such an argument had no place in the trial.

During the course of the instructions, the Court stated:

> "Reference was made, for instance, in the argument of the District Attorney to a certain book and a certain character of some thirty years ago, one Dillinger. That was mentioned solely for the purpose of illustrating that on occasion informers do come from former associates of persons charged with crime, that, and nothing more. . ." (Tr. 397).

Following the instructions, the jury deliberated and convicted appellant and Tyler, but acquitted Flynn.

Following the verdict, both counsel for Tyler and appellant filed motions for judgment of acquittal n.o.v. or in the alternative for a new trial. Counsel for Tyler in his motion stated that he was informed by a juror,

Christopher Birkhead, that he heard one of the jurors state in the presence of other jurors that, "one or more of the defendants had been known to her as a hardened criminal whose pictures I have seen in the papers."

During the course of a hearing on the motion on July 28, 1967, counsel for Tyler stated to the Court:

> "Your Honor will, of course recognize that this motion is based upon representations of counsel, and I am that counsel. I am that attorney. I am the attorney who had the conversation with witness Birkhead. After my conversation with him, having satisfied myself and only myself with respect to the substance of that conversation, I immediately went to my office and dictated the motion that is now a part of this trial, and I used the language of the witness as he related it ot me.
> I am saying this both as an officer of the Court and as a witness, if need be, and I would respectfully ask that your Honor put me under oath for that purpose."

The Court felt that putting the attorney under oath was not necessary. (Tr. 31-32, proceedings of July 28, 1967.)

The juror Birkhead was interrogated by the Court on two occasions. The first was at a bench conference and the second was in the Judge's chambers. (Tr. 22, proceedings of July 28, 1967). According to Birkhead's statement to the Court at the bench conference one of the women said:

> "I have read about so and so and in talking to a friend I read about so and so in the papers over the last several years." (Tr. of 7-28-67, pg. 22).

Upon questioning by the Court, Birkhead stated that the juror did not mention by name any of the defendants. He stated that it could have been one of them, but it also could have been one of the witnesses. (Tr. of 7-28-67, pge 23).

Two of the women jurors were having the discussion. (Tr. of 7-28-67, pg. 25-26).

When questioned by counsel for Tyler as to whether during their conversation, Birkhead had used the language "she recognized one or more of the defendants as being known to her as hardened criminals," Birkhead stated that he could have used that language. (Tr. of 7-28-67, page 27). In further response, Birkhead stated:

> "Woman number two said, and these are perhaps not her exact words, but the general idea was, 'Yes, I have seen about him in the paper." The remark of humber one may have been, 'So and so looks like a tough one', or something like that. I don't remember this hardened criminal bit. She may have alluded in some way, and I cannot be specific, to one of the people appearing. Woman number two said, 'Yes, I have read about him in the paper.' (Tr. of 6-28-67, page 30).

Birkhead was then excused and left the Judge's chambers.

Each one of the women jurors was brought to the Judge's chambers, and each denied any knowledge of the substance of Birkhead's statements. (Tr. of 6-28-67, pages 33-48).

During the voir dire examination the prospective jurors were asked whether they knew defendants or counsel. There was no response. (Tr. 4-5). They were also asked if they had heard about the robbery or read something about it in the papers, to which a prospective juror answered in the affirmative. (Tr. 5-8). The prospective jurors were also asked if they knew Clarence McFarland, convicted bank robber. No response. (Tr. 9-10).

The prospective were also asked if any of them had been robbed. (Tr. 13). Three prospective jurors responded that

they had been victims of crimes. (Tr. 13-17). The prospective jurors were then asked if any close relatives or very close friends had been robbed. (Tr. 17).. Four jurors responded in the affirmative. (Tr. 17-20).

During the voir dire, Christopher Birkhead stated that he had sat on juries three times. The last time in 1961. (Tr. 26). He admitted later to the Trial Judge, after the conviction that he failed to disclose on voir dire that a great many years ago, his parents home was entered, but nothing was taken. He made no disclosure because he did not think the incident relevant.

ARGUMENT

The Motion for New Trial

As part of the motion for new trial, made by counsel for Tyler and adopted by counsel for appellant, below, the allegation was made that one of the female jurors had communicated to other jurors knowledge which she allegedly had about one of the defendants being known to her as a hardened criminal whose pictures she had seen in the papers.

The attorney was prepared to testify under oath concerning the contents of the statement made by one Birkhead, to him. This offer was declined by the Trial Judge. It appears from the record that the hearing on the motion for new trial, in which certain jurors were interrogated, was not under oath. Neither was the juror, Birkhead, confronted with the four women jurors to identify the person who made the remark. He was excused from chambers after his statement and before the

women jurors came in, one by one.

The Sixth Amendment right to trial by jury means a trial before a panel of impartial and indifferent jurors and the failure to accord an accused a fair trial violates minimal standards of due process. Irvin v. Dowd, 366 U.S.717. Jurors who have formed an opinion as to the issues to be tried are subject to challenge. Reynolds v. United States, 98 U.S. 145.

As was stated in the case of United States v. Wood, 299 U.S. 123

> ". . .Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

Regarding the responsibility of jurors to honestly respond to questions on voir dire, this Court said in Carpenter v. United States, 69 U.S. App. D.C. 306, 100 F.2d 716:

> ". . .it is the duty of every juror to answer questions affecting his qualifications honestly, and if he conceals a material fact which, if disclosed, would probably have induced counsel to strike him from the jury, a new trial should ordinarily be ordered."

The allegations contained in the motion for a new trial in these particulars raised serious issues as to jury partiality and bias. They concerned not questions of impeachment of jury verdict involving the personal consciences of individual jurors, but matters os extraneous influence. See Mattox v. United States, 146 U.S. 140. Furthermore, they raised the question as to whether or not certain jurors concealed facts about their knowledge of one or more of the defendants received outside the

confines of the evidence in the trial of the case which would have resulted in either challenge for cause of peremptory challenge. Carpenter v. United States, supra.

It is submitted that these matters should have been fully explored by means of a proper hearing. Such a hearing as was approved by this Court in Ryan v. United States, 89 U.S. App. 328, 191 F.2d 779.

In the instant case, no evidence or testimony appears from the record to have been under oath. In fact, the Court declined the offer of counsel for Tyler to be sworn and give his evidence on the matter. The answer given by Birkhead were, in appellant's opinion, equivocal. It also seems unusual to appellant that no confrontation was arranged between Birkhead and the female jurors so that the identities of the female jurors involved would be revealed to the Court.

In Reynolds v. United States, supra. the Supreme Court had the following to say concerning the manner of exploring the issue of partiality:

> ". . .It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the Court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. ."

Appellant submits that the hearing conducted on this vital constitutional issue of jury bias and concealment did not comport with the decisions heretofore cited, and that at least the cause should be remanded for a full evidentiary hearing, in open court, and under oath on the allegations made.

It also developed, in post trial proceedings, that the juror Birkhead, failed to disclose on voir dire that several years prior thereto, his parents home was entered, but nothing was taken. Birkhead stated that he made no disclosure, because he did not think the incident relevant. It is obvious that this was a conscious failure to reveal information asked on voir dire. Birkhead was no novice to jury duty, having served on juries on three prior terms of service. The record indicates that Birkhead was present when other members of the prospective panel gave answers to the question on voir dire.

This problem has recently been dealt with by this Court in Jackson v. United States, No. 20,402 and 21,148, decided April 10, 1968. Also note United States ex rel. De Vita v. McCorkle, 248 F.2d 1. Birkhead's non-disclosure was positive. Counsel were entitled to have their questions answered on voir dire to ascertain challenges for cause and peremptory challenges to which they were entitled. Rule 24, Federal Rules of Criminal Procedure. Appellant submits that exceptions in cases of non-disclosure should not be permitted, especially where the prospective juror makes the decision as to disclosure thereby depriving counsel of consideration as to whether he will exercise a challenge as to such prospective juror

The Rebuttal Argument of the Government

Counsel for the Government, during its argument in rebuttal, made extensive references to two extraneous matters which were not part of the evidence in the case. Apparently,

they were made in support of the witness, McFarland, and his role as an informer.

The Government alluded to a recent best selling novel which concerned a senseless and brutal murder of an entire Kansas family, by two men who were later executed for the crimes. The title of the book, obviously to arouse emotional appeal by the author and publishers was "In Cold Blood."

Government counsel then proceeded to give the jury a capsule history of a notorious figure of the "gangster era of the '30's" named John Dillinger. Counsel alluded to Dillinger as a bank robber, prison escapee, and finally police killer who was shot and killed in Chicago. He met his fate as a result of information supplied by a woman.

A motion for mistrial was made on behalf of counsel for Tyler, but appellant submits that the error should be considered as affecting appellant as well as he was tried with Tyler and Flynn. The Court denied the motion and during the course of its charge referred to the statements of Government counsel and gave the Court's characterization of the argument.

Appellant was charged with a grocery store robbery, which is serious enough. None of the parties at the trial were charged with murder, let alone the murder of an entire family. No one faced the death penalty. None were charged with bank robbery, prison escape, nor the murder of a policeman. It is submitted that the extended reference to the two extraneous matters outlined above was an appeal to passion and prejudice which had no place in the trial.

In Hansford v. United States, 249 F.2d 295, the Fifth Circuit reversed a conviction for possession of untaxed whisky where the prosecutor made references to victims of highway accidents. The argument was held to be an improper appeal. The Court said, at page 296:

> "A United States district attorney carries a double burden. He owes an obligation to the Government, just as an attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of the government dedicated to fairness and equal justice to all, and in this respect he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer. In this case zeal outran fairness. The argument of the United States Attorney in the district court was improper, prejudicial, and constituted reversible error."

See also, Berger v. United States, 295 U.S. 78, 88.

In the case of Dunn v. United States, 307 F.2d 883, the Fifth Circuit reversed an income tax evasion case where the prosecutor referred to "kickbacks" paid by a contractor to a politician and to the effect that all politicians take "kickbacks."

In Case v. North Carolina, 315 F.2d 743, a habeas corpus case, where petitioner was charged with rape and wherein the prosecution in summation referred to petitioner as "mad dog", "animal" and "convict." The issue involved effective assistance of counsel.

In Washington v. United States, 327 F.2d 793, wherein appellant was charged with possession of untaxed whisky, the district attorney referred to the right of people to be

secure in their homes and that a Government undercover agent was acting at the risk of personal safety.

The point of these cases, as appellant sees them, is that the argument was outside the evidence and was calculated to appeal to the passions and prejudices of the jury. In the instant case, the argument concerning the novel and the capsule life of a gangster of years ago had no place in the trial and was not part of the evidence. It was an attempt by passion and fervor to bolster the main Government witness, McFarland, who was a convicted bank robber, informer who had implicated some dozen persons in crime, who expressed personal motives for giving testimony and hope of favor and who admitted that when he testified before the Grand Jury he failed to tell the Grand Jury of his participation in the robbery.

These factors had nothing to do with a mass murder in Kansas and the life of Dillinger.

The Testimony of Clarence McFarland

The principal witness against appellant was Clarence McFarland. This witness was serving a three to nine year sentence at the time he testified. He admitted that he made his living through robberies; that he had implicated some dozen persons in crimes; that he had never been indicted in the cases in which he gave evidence; and that he gave evidence before the Grand Jury about the instant case, but failed to disclose to the Grand Jury his participation. He also testified that he expected some nebulous help from the prosecutor about obtaining a barber's license in the future and possibly

some assistance in the matter of his present sentence.

The only weapon availed by the appellant at trial was cross-examination and argument. The Court, of course, instructed the jury on accomplice testimony and the testimony of an admitted perjurer. There is nothing in the record, as far as present counsel can ascertain, that the Grand Jury testimony of McFarland was produced or requested; especially in view of McFarland's critical position. Dennis v. United States, 384 U.S. 855; Vance Allen v. United States, No. No. 20,955, decided Jan. 25, 1968.

The record will bear out that McFarland had been in close contact with the prosecution for some time. He was made availableto the prosecutor for interview and also appeared before the Grand Jury. Contrawise, he was, for practical purposes, not accessible to counsel for appellant or the others. In the first place he was a federal prisoner and secondly, he could have refused to talk, and not necessarily on direction by the Government.

In view of these unusual circumstances, appellant advances this admittedly novel contention. The Trial Court should have conducted a voir dire, outside the presence of the jury, concerning all of the surrounding circumstances of McFarland's testimony. His Grand Jury testimony should have been made available and all statements, recorded and unrecorded, should have been produced. Further, all promises and inducements held out to McFarland should have been fully examined, under oath, to ascertain whether McFarland was motivated by considerations other than to tell the truth. Furthermore to

determine whether McFarland was in fact or in law coerced to give testimony.

Dennis v. United States, supra, speaking in connection with Grand Jury testimony, but appropos herein, states:

> "In our adversary system for determing guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations. . ."

It is true that what may be involved here is the standing of one on trial to attack the constitutional protection of another. See, Jones v. United States, 362 U.S. 257; Wong Sun v. United States, 371 U.S. 471.

However, exclusionary rules seemed to be aimed at deterrance of lawless actions on the part of the police. Linkletter v. Walker, 381 U.S. 618, 637; also note, Tehan v. United States ex rel Shott, 382 U.S. 406, 413.

In People v. Martin, 290 P.2d 855, 857, the California Supreme Court, stated:

> ". . .Since all the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights. . ."

In this connection also note, People v. Varnum, 427 P.2d 772, 775-776.

It would seem that in the interest of fundamental fairness Courts should be zealous to afford every defendant a fair trial untainted by illegal or false testimony.

Serious constitutional issues regarding coercion of a witness was foreseen in Turner v. Pennsylvania, 338 U.S. 62,

and United States v. Wolf, 307 F.2d 798. Of course, this Court in Laughlin, et al. v. United States, 385 U.S. 287, ____U.S. App. D.C. ____ considered the availability of full cross-examination and the fact of open court testimony, but appellant submits that the opportunity for full cross-examination may not always reveal things that have transpired between witness and prosecutor and the authorities. Further, there is the danger of prejudicial and incompetent evidence being aired to a jury. This all could be obviated by the voir dire suggested herein. As a conviction can be obtained in this jurisdiction on the uncorroborated testimony of an accomplice and in view of the apparent closeness with which McFarland and the authorities worked, in this as well as other cases, the fair procedure, in appellant's view, would be to have all of the surrounding circumstances aired before the Court, so that all of the rights of the appellant could be protected.

CONCLUSION

Wherefore, the premises herein considered, the appellant submits that the conviction herein should be reversed and the case remanded with such direction as the Court deems appropriate.

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by an asterisk.

ISSUES PRESENTED

In the opinion of the appellee, the following issues are presented:

1) Whether the court erred, during the hearing of appellant's motion for a new trial, by not placing the jurors under oath before they testified and by not arranging a confrontation between the accusing juror and the jurors alleged to have been involved in a conversation about someone who participated in the trial.

2) Were the prosecutor's references, during his summation argument, to John Dillinger and Truman Capote's book entitled "In Cold Blood" prejudicial to appellant, denying him a fair trial.

3) Where a Government witness was a convict and an admitted robber and perjurer, should the court have ordered production of the witness' Grand Jury testimony and other statements and then conducted a voir dire outside the presence of the jury to determine if the witness would testify truthfully, without coercion or reward.

This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,443

CHARLES V. TURNER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant and two other men, Oscar Tyler, Jr. and Derotha Flynn, were indicted for the robbery [1] of the Giant Food Store at 6541 Georgia Avenue, N.W. The robbery occurred on December 1, 1965. The first trial of these defendants resulted in a hung jury. A second trial was held June 5, 6, and 7, 1967 before Judge Oliver Gasch. The jury found appellant guilty and he was sentenced to three to twelve years imprisonment.[2]

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[1] 22 D.C. Code § 2901.

[2] Oscar Tyler, Jr. was also found guilty. Derotha Flynn was acquitted.

The relevant facts relating to this crime show that at approximately 7:30 a.m. on December 1, 1965 three robbers[3] entered the rear of the Giant Food Store, while a fourth robber[4] waited at the rear of the store where he could watch several Giant employees who were working in a walk-in meat box (Tr. 171). Once inside, appellant went to the manager's office where Navie Rowley, Assistant Manager Trainee, was counting the store's money. Appellant thrust a gun into Rowley's side and forced him to lie on the floor (Tr. 56). A second robber, Clarence McFarland,[5] entered the manager's office and together the two men scooped up all the available money and put it in their pockets (Tr. 173, 174).

A third robber, Oscar Tyler, Jr., who had gone into the store aisles, was having some difficulty rounding up all the store employees. He called to appellant and McFarland for help (Tr. 172). With their help, the store employees were marched to the rear of the store where they were forced into the walk-in box.[6] The four robbers then fled with approximately $3300.00 (Tr. 174).

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[3] Clarence McFarland, Oscar Tyler, Jr. and appellant.

[4] Derotha Flynn.

[5] Clarence McFarland, admitted his participation in the crime, turned State's evidence, and testified against the three defendants.

[6] As a result of their close confrontation with the robbers, two of the employees were able to identify two of the defendants at trial. Joseph Bowman identified appellant (Tr. 78, 79) and Henry Fox identified Tyler (Tr. 103). And of course McFarland identified all three defendants as participants in the crime.

ARGUMENT

I. The court did not err by failing to place under oath the jurors who testified at the hearing on the motion for a new trial or to arrange a confrontation between Birckhead and the alleged jurors involved.

(Mo. Tr. 21-50)[7]

Following the jury's verdict, counsels for Tyler and appellant filed a motion for judgment N.O.V. or in the alternative for a new trial. Tyler's counsel alleged in the motion that he had been informed by a juror, Christopher Birckhead, that during the trial a lady juror had said to another juror that "one or more of the defendants had been known to her as a hardened criminal whose picture I have seen in the papers."

On July 28, 1967, Judge Gasch conducted a hearing in his chambers. Both defendants and their counsels were present. Juror Birckhead was the first witness called. His unsworn testimony was extremely vague and equivocal. He stated that he heard a lady say,

> "I have read about so and so and in talking to a friend I read about so and so in the papers over the last several years." (Mo. Tr. 22).

Birckhead did not know what newspaper she was referring to (Mo. Tr. 22) or whether she was referring to a witness, a defendant, or some other person at the trial (Mo. Tr. 23, 29, 30). Nor could he identify the lady jurors alleged to have been involved in the conversation.

Birckhead went on to testify that two days after the trial had concluded, he was approached by Tyler's counsel and asked questions about the trial and it was during this conversation that he revealed the information upon which counsel based his motion for a new trial. At the conclusion of Birckhead's testimony, he immediately left for work. The court then called the four lady jurors who had

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[7] Page references to the hearing on the motion for a new trial are identified as (Mo. Tr. ——).

participated in the trial.[8] Each juror was called individually and told that a male juror had recently told the court that he overheard a conversation between two female jurors in which one of them stated to the other than she remembered reading about one of the persons in the trial and that he looked like a bad one or that he looked like a hardened criminal or something like that. Each juror was asked if she remembered anything like that or knew anything about it. Each juror unequivocally denied any knowledge of the conversation. Tyler's counsel then introduced additional newspaper clippings about witness McFarland and the hearing was terminated. Appellant's motion was subsequently denied.[9]

Appellant contends that the trial court erred, during the hearing of appellant's motion for a new trial, by not placing the jurors under oath before they testified and by not arranging a confrontation between the accusing juror, Birckhead, and the four lady jurors, two of whom were alleged to have been involved in the conversation.

We do not perceive of any prejudicial irregularities occurring in the procedures adopted by the trial court during the hearing. Both defense counsels were experienced and present at the hearing, yet neither objected to the taking of unsworn testimony or to the dismissal of Birckhead without a confrontation with the lady jurors. Under these circumstances, appellant should not be heard to raise these issues for the first time on appeal. See *Thomas* v. *Dads Root Beer & Canada Dry*, 225 OR. 166, 356 P.2d 418 (1960); *Wilcoxon* v. *United States*, 231 F.2d 384 (10th Cir. 1956); *Pooley* v. *State*, 116 Ind. 199, 62 N.E.2d 484 (1945); 6 WIGMORE, EVIDENCE (3rd Ed.) § 1819, all

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[8] The lady jurors were Mrs. Dorothy Queen, Mrs. Rebecca Wineberg, Mrs. Ernessine Moxley and Mrs. Helen Webster.

[9] The issue of bias and prejudice was susceptible of an intelligent judgment by the trial judge on the basis of the evidence adduced at the hearing on the motion and there is nothing to show that he abused his discretion by denying appellant's motion. *Mattox* v. *United States*, 146 U.S. 140 (1892); *Ryan* v. *United States*, 89 U.S. App. D.C. 328, 191 F.2d 779 (1951).

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of which recognize waiver of oath; *Silva* v. *Klinger*, 355 F.2d 657 (9th Cir. 1966) wherein the court recognized waiver of confrontation. Not only do we submit that appellant waived his right to object to the unsworn testimony, but we point out that the jurors had been sworn to fulfill their jury duties and that they were testifying at a motion hearing and not at the trial itself. Moreover, their testimony was given in an atmosphere conducive of truthfulness. The judge, two defense counsels, two defendants, and a court reporter were present in the judge's chambers when they testified. And the judge and the two defense counsels examined and cross-examined all of the jurors.

Nor will appellant's contention that there should have been a confrontation between Birckhead and the lady jurors withstand scrutiny. Confrontations between the accused and the accusor are constitutionally guaranteed only in criminal proceedings and Birckhead was not accusing the other jurors of a crime. United States Constitution, Amendment 6; *Olshausen* v. *C.I.R.*, 273 F.2d 23 (9th Cir. 1960), *cert. denied*, 363 U.S. 820. In addition, the court accurately rephrased Birckhead's testimony when it asked the jurors if they recalled the alleged conversation. Moreover, it was Tyler's counsel who suggested to the court, at the conclusion of Birckhead's testimony, that he be excused. The court replied that it understood that Birckhead had to get back to work (Mo. Tr. 31), indicating a prior arrangement between counsel and the court to excuse Birckhead as soon as he finished testifying.

Appellant also contends Birckhead failed to disclose on voir dire that several years before the trial his parents' home was entered by robbers. (App. Br. 11). However, there is nothing in the record to support this contention and it should be disregarded by the court.

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[10] Page references to appellant's brief are identified as (App. Br. ——).

II. The prosecuting attorney did not exceed the bounds of proper argument on rebuttal.

Appellant argues that the prosecutor's references to John Dillinger and Truman Capote's book entitled *In Cold Blood* were so prejudicial that he was denied a fair trial.[11]

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[11] "Probably many of you remember many instances in your lifetimes, in history, or in your reading, where men have come forward from within the criminal ranks and helped and it's not a bad thing at all.

Mr. Koonin talks about a crime-ridden city. Where do you get evidence from within about a planning of a professional robbery such as this, when there has been no seizure of a car, when no police radio can be found?

Where do you get evidence that will pinpoint that alibis were planned in advance? Where do you get evidence so that you can find out who committed a crime?

Sometimes witnesses on the scene can't put the whole picture together.

They don't know the routes that were taken to the place to split up the money.

Where do you get that evidence? Not from the choir boxes of our churches, not from the personnel sitting within a building such as this, not from a D.A., not from a defense counsel, not from a policeman, not at all.

You get it from within.

Perhaps some of you have read Truman Capote's book, *In Cold Blood*. He probably made a million dollars writing that story.

If you read the story you know that that vicious horrendous crime would not have been solved but for an accomplice coming forward, someone who heard something, one from the criminal ranks coming up. The crime is solved.

If you go back a little bit farther in history, back into the early 30's, with John Dillinger—there is not one of you who doesn't remember the facts about Dillinger.

After he plagued the country for a long time, was a fugitive, the Bureau of Investigation trying to find him, he robbed another bank, he is locked up again, he escapes again, he kills a policeman in the city of Chicago.

But Dillinger can't be found. How do you find Dillinger? Only from someone from within the criminal ranks coming forward, the notorious lady in red.

She came forward, and you will recall she told the partner of the policeman who had been killed where Dillinger would be on a given night and as he came out of the theater and moved for his gun, he was killed.

[Footnote continued on page 7]

We point out initially that appellant made no objection to the prosecutor's statements at trial and relies solely upon an objection raised by co-defendant Tyler's counsel at the close of all the argument. In these circumstances, he should not be heard to raise this issue for the first time on appeal. *Leary* v. *United States*, 383 F.2d 851 (5 C.C.A. 1967); *Fogarty* v. *United States*, 263 F.2d 201 (5 C.C.A. 1959). Moreover, appellant was in no way prejudiced. The prosecutor's remarks, when viewed in context, were made in an effort to rehabilitate McFarland's credibility and to illustrate to the jury the need and desirability of those involved in criminal activities to come forward and give evidence against their former associates in crime. They were provoked by the continual and relentless attempts of the three defense counsels to portray McFarland as a disreputable informer, unworthy of belief. Under these circumstances, the prosecutor's remarks constituted justifiable rebuttal argument. *Pardon* v. *United States*, 254 F.2d 574 (5 C.C.A. 1958).

In addition, the trial judge specifically charged the jury:

> Now, ladies and gentlemen, the statements and arguments of counsel are not evidence. They are only intended to assist you in understanding the evidence and the contentions of the parties. Reference was made, for instance, in the argument of the District Attorney to a certain book and a certain character of some thirty years ago, one Dillinger. That was mentioned solely for the purpose of illustrating that on occasion informers do come from former associates of persons charged with crime, that and nothing more.

See *Keeble* v. *United States*, 347 F.2d 951 (8 C.C.A. 1965), *cert. denied*, 382 U.S. 940. There is nothing in this

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[11] [Continued]

> Had he not been killed surely other policemen would have been killed and other banks would have been robbed.
>
> But crimes, not just today, not the crime of December 1, 1965, but crimes throughout history are solved in large measure by the cooperation of some criminals who come forward."

record to indicate that the jury did not follow the trial court's instructions.

Furthermore, the evidence at trial was uncomplicated and substantially supported the jury's verdict. *Corley* v. *United States*, 124 U.S. App. D.C. 351, 365 F.2d 884 (1966); *Jones* v. *United States*, 119 U.S. App. D.C. 213, 338 F.2d 553 (1964). Appellant was identified as one of the robbers by both Joseph Bowman, a store employee and eyewitness, and Clarance McFarland, an admitted participant in the crime. Moreover, appellant made no attempt to rebut their testimony or to present a defense.

III. Even though McFarland was a convict and an admitted robber and perjurer, it was not necessary for the court to order production of his Grand Jury testimony and his other statements and conduct a voir dire, outside the presence of the jury, to determine his credibility.

(Tr. 178-282, 289-307, 404, 405)

Appellant contends that since McFarland was a convict and an admitted robber and perjurer, the trial court should have ordered production of his Grand Jury testimony and all of his statements and then conducted a voir dire, outside the presence of the jury, to determine if McFarland was motivated by considerations other than telling the truth and whether he was, in fact or in law, coerced into testifying.

There is nothing in the record to indicate that the jury could not determine McFarland's credibility and the weight to be given his testimony. *Bush* v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 602 (1967). Even though McFarland's Grand Jury testimony was not available to defense counsels at trial, there was no controversy as to its content.[12] In fact, McFarland admitted during

[12] Appellant suggests that the court erred by not providing him with a copy of McFarland's Grand Jury testimony before McFarland testified at trial (App. Br. 15). Yet appellant never made a motion for production of McFarland's testimony. See Rule 6(e), F.R. Crim. P. Certainly the trial court is not obligated to produce Grand Jury testimony of its own motion. *Allan* v. *United States*, —— App. D.C. ——, 390 F.2d 476 (1968).

direct examination and again during an extensive and informative cross-examination by the three defense counsels (Tr. 178-282, 289-307) that he had perjured himself before the Grand Jury by not disclosing the fact that he had participated in the robbery. It was also brought out during cross-examination that McFarland had a lengthy criminal record, that he was presently serving a term in prison for the commission of a felony, that he had been an accomplice in the Giant Store robbery, and that he had informed on a number of other persons with whom he had committed crimes, but was himself never indicted for those crimes. All of these facts, illicited during cross-examination, were available to defense counsels during their closing arguments. In addition, the court charged the jury to receive the testimony of an admitted perjurer, accomplice, and informer with caution and to scrutinize it carefully (Tr. 404, 405). Moreover, there was nothing in the record to indicate that McFarland was coerced or encouraged to testify by the prosecutor. McFarland repeatedly testified that he had been promised nothing by the prosecutor in return for his testimony other than a statement of fact concerning his criminal record in the event the Board of Barber Examiners attempted to revoke his barber's license. (Tr. 191-193, 289). He started that he was cooperating with police because his appeals were exhausted and because he wanted to get even with some of his friends who had had him arrested on a gun charge (Tr. 187, 188).

In sum, there was no reason for the court to conduct a voir dire examination to determine McFarland's credibility. The jury was the trier of the facts and they were well advised of McFarland's background and previous activities and quite capable of determining his credibility. *Bush* v. *United States, supra.*

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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